UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| RICHARDS CONSTRUCTION COMPANY-KANEOHE BAY PROJECT, BARRY J. RICHARDS CO., BAYRICH, INC., BAYRICH INC. OF CALIFORNIA, BARRY J. RICHARDS, INC., RICHARDS CONSTRUCTION COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, BARRY J. RICHARDS, and GERTRUDE RICHARDS, Appellants, vs. AIR CONDITIONING COMPANY OF HAWAII, Appellee. | ) | No. 17748 |

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF HAWAII

# ANSWERING BRIEF OF APPELLEE

James S. Campbell
Robert B. Bunn
4th Floor, Bishop
Trust Building
Honolulu, Hawaii

Attorneys for Appellee

Of Counsel:

SMITH, WILD, BEEBE & CADES

Subject Index

Subject Index

Table of Authorities Cited

---

Cases

## Statutes



## Rule



## Secondary Authorities

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| RICHARDS CONSTRUCTION COMPANY-KANEOHE BAY PROJECT, BARRY J. RICHARDS CO., BAYRICH, INC., BAYRICH INC. OF CALIFORNIA, BARRY J. RICHARDS, INC., RICHARDS CONSTRUCTION COMPANY, MASSACHUSETTS BONDING AND INSURANCE COMPANY, BARRY J. RICHARDS, and GERTRUDE RICHARDS, Appellants, vs. AIR CONDITIONING COMPANY OF HAWAII, Appellee. | ) | No. 17748 |

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF HAWAII

---

ANSWERING BRIEF OF APPELLEE

---

## JURISDICTION

The jurisdictional statement contained in Appellants' Opening Brief is correct.

## QUESTION PRESENTED

Where Appellants based an offer on a mistaken belief as to certain materials called for by Appellee's

bid specifications and the parties, some six months after the creation of an informal contract based on such offer and after negotiations looking toward a compromise of the disputed validity of such contract, entered into a new formal contract containing a higher contract price, and where the trial court finds as fact that there is consideration for such formal contract, may the formal contract be set aside on appeal as without consideration?

## SUMMARY OF ARGUMENT

I

The District Court decision, as shown by the authorities upon which it is based effectively holds that the parties rescinded the old March 1958 contract by entering into a new contract in September 1958. When there is such a rescission the substituted mutual promises of the parties are sufficient consideration to support the new contract.

II

In Hawaii, by case precedent the question of whether or not there is consideration for the substitution of a new contract for an old contract is a question of fact. In the instant case the lower court found:

> "...that there was adequate consideration on both sides to support the formal contract of September 28, 1958, modifying the informal

contract of March 1958...." (Findings of Fact and Conclusions of Law p. 14)

Such findings of fact unless "clearly erroneous" should be affirmed by this court.

III

Assuming but not conceding that there was not a mutual rescission followed by the formation of a new contract, nevertheless this case would properly fit under the well recognized "burdensome conditions" exception to the rule that there is no consideration for a promise of additional consideration for an unchanged performance. The Hawaii Supreme Court is of the opinion that the general rule is "harsh" and "violative of good faith" and will depart from such rule on "slight distinction". Thus, the Hawaii Supreme Court would adopt the "burdensome condition" exception to the general rule, which exception has grown to such proportion in this country that it is now larger than the rule itself.

## A R G U M E N T

### I

THE FORMAL CONTRACT ENTERED INTO BY THE PARTIES DURING SEPTEMBER 1958 WAS SUPPORTED BY VALID CONSIDERATION SINCE THE ENTRY INTO SUCH NEW CONTRACT CONSTITUTED A RESCISSION OF THE OLD INFORMAL CONTRACT OF MARCH, AND THE MUTUAL

PROMISES OF THE PARTIES TO THE NEW CONTRACT ARE VALID CONSIDERATION THEREFOR.

(a) The Opinion of the District Court Shows that It Found As a Matter of Fact That There Had Been a Rescission of the Old Contract.

At page 14 of the Findings of Fact and Conclusions of Law the lower court stated:

> "...It has been stated many times 'the right to contract includes the right to modify, change or abrogate a pre-existing contract and the mutual promises of the parties are sufficient to support the new agreement'..."

The reason and necessity for this rule is self-evident. Parties who are free to contract and so contract must also be free to change, rescind or otherwise modify the contract that exists between them in order to meet problems and new circumstances originally unforeseen. Such changes, or re cissions, if agreed to, are valid and enforceable, for the new promise of one is consideration for the new promise of the other. In such a situation the courts do not make inquiry into the adequacy of the new consideration.

In this case, the lower court found that there was adequate consideration for the new contract of September 29, 1958. (Findings of Fact and Conclusions of Law, p. 14) In support of its finding the Court quoted the Restatement of Contracts, Section 406, Comment a., that:

> "...the agreement of each party to surrender his rights under the contract affords sufficient consideration to the other for his corresponding agreement..."

In effect the lower court found that the parties rescinded the informal March contract and entered into a new contract on September 29, 1958. The reasons given for such holding and the authorities cited in support thereof by the lower court are all based on the above-quoted rule of law. Supporting this contention are the citations found by the court to be "on all fours with the present problem." All of these cases, on close examination, will be found to be rescission cases, where the parties released themselves from their former contract by entering into a new one.

In Borin Corp. v. Commissioner of Internal Revenue, 117 F.2d 917, 920 (6th Cir. 1941), cited by the District Court, it was pointed out that parties to a contract are always at liberty to rescind a contract as to executory obligations. The Court found that the defendant under the facts of the Borin case:

> "...cannot contend that this [new] agreement, deliberately executed, did not carry the legal conclusions which attach to the language employed by it."

Where Richards Construction Company drafted a new contract and sent it to the Appellee for execution after

protracted negotiations, it would seem anomalous to allow the Appellants to avoid the clear import of the language deliberately embodied in the contract which the Appellants drafted and executed in substitution for the informal contract of March.

As quoted in Ting v. Born, 21 Haw. 652, 660 (1913), the rule is that:

> "...As a contract is the result of agreement, so an agreement may put an end to a contract. Therefore a contract may be discharged at any time before the performance is due, by a new agreement with the effect of altering the terms of the original agreement or rescinding it altogether; and a claim under the original contract may then be met by the new agreement, so far as the latter operates to alter or rescind the former..."

In the Ting case, the Hawaii Supreme Court held:

> "...the evidence adduced by the plaintiff tends to show that by the terms of this latter contract, which was a new, distinct and independent contract, all the respective rights and obligations of the parties created and imposed by the October contract were completely wiped out;..." (Id. 660)

(b) The Rescission of an Old Contract and Entry into a New Contract Provide Their Own Consideration.

As stated in Savage Arms Corp. v. United States, 266 U.S. 217, 220 (1924) (citing by the lower court):

> "...It is enough to say that the parties to a contract may release themselves, in whole or in part, from its obligations so far as they remain executory, by mutual agreement, without fresh consideration.

> The release of one is sufficient consideration for the release of the other. If authority for a rule so elementary be required see for example:..." [citing cases]

It is of course unnecessary that the consideration for a contract be set out therein. Clark & Henery v. Hackfeld & Co., 16 Haw. 53, 62 (1904).

In Trousseau v. Cartwright, 10 Haw. 138, 142 (1895), the court quoted with approval the rule that:

> "...'detriment to the promisee is a universal test of the sufficiency of consideration; i.e. every consideration must possess this quality, and, possessing this quality it is immaterial whether it is a benefit to the promisor or not.'..."

In the Trousseau case the Hawaii Supreme Court held that it was a detriment to one party to a debt to promise to pay an outstanding balance "as soon as circumstances would allow" (stated by the court to be equivalent to "when able") even though it was clear that the other party could have compelled the debtor to pay "when able" in any case.

In the case before us it was clearly a detriment for Appellee, Air Conditioning Co. of Hawaii (hereinafter sometimes called "Air Conditioning"), to agree to proceed immediately with the new contract.

It is also clear that there was substantial benefit to Appellant, Richards Construction Co. (hereinafter called "Richards"), for Air Conditioning to perform the new contract.

The first benefit is that the Appellee could and did timely perform the contract thus not adversely affecting the construction schedule of the 650 housing units to be built. Secondly, even at the revised figure, Air Conditioning's bid was much less than the next lowest bid. Richards also saved the time, expense and apprehension of litigation involved in pursuing its remedy for damages, if any, should he have granted the subcontract to a third party. In addition, Richards had the benefit and security of not being put to the delay and uncertainty incident to finding some other contractor to perform the necessary sheet metal work.

In the final analysis one can only conclude that in September of 1958 Richards wanted Air Conditioning to perform the subcontract for $62,000. He knew there would be no performance at the lower figure, and he knew that the actual validity of the informal contract was in doubt.[1/] As he said, "...I was interested in getting the lowest possible bid I

---

1/ This doubt is recognized by Mr. Richards at page 424 of the transcript. [Mr. Cox] "Q: I still don't think you get the import of my question. If you weren't intending to pay more than 48,000, why was it so vital that you bring it down from 68 to 62? [Mr. Richards] A: Because if I lost--" Apparently what Richards really wanted to do was to enter into a contract which reduced his exposure but one which would not reduce Appellee's exposure.

could with the amount of exposure I had". (Tr. 424) Thus, to obtain performance and to reduce his exposure Richards did his best "...to compromise the figure down to whatever possible figure I could get them to perform..." (Tr. 415-416) Accordingly, when Richards drafted the new contract and executed it intended to both reduce his exposure and obtain immediate performance.

One can conclude that Richards must have intended to settle the dispute by rescinding what the lower court later found to be the informal contract of March. Once the informal contract was rescinded, and the lower court appears to have so held, the mutual promises of the parties are sufficient consideration to support the new contract of September 1958. Savage Arms Corp. v. United States 266 U.S. 217, 220 (1924).

II

THE DISTRICT COURT HAS FOUND THAT THE SEPTEMBER CONTRACT WAS SUPPORTED BY ADEQUATE CONSIDERATION. THAT DECISION IS NOT CLEARLY ERRONEOUS AND MUST BE AFFIRMED.

In many circumstances whether there was or was not a rescission of a previous contract by a later one is a question of fact. The testimony adduced clearly indicates that in this case the question is one of fact. The cumulative effect of all of the testimony and the credibility

of each witness was considered and weighed by the District Court before it entered its finding.

The lower court expressly found that there was adequate consideration for the September 29 contract and that the modification of the March 1958 contract by the later contract was a benefit to Richards. (Findings of Fact and Conclusions of Law p. 15) The finding that the modification was of benefit to Richards is consistent with the Hawaii cases cited above, and may not be reversed by this court unless clearly erroneous.

> "...Findings of fact shall not be set aside unless clearly erroneous..." Fed. R. Civ. P. 52(a).

Under the doctrine of the Hawaii cases to be discussed infra, III (a), whether there is consideration for a promise of additional compensation for a previously agreed upon performance is a question of fact to be decided upon by the jury, and the Hawaii court will go to great lengths to avoid the harsh effects of the general rule. The effect of such Hawaii doctrine, coupled with the "unless clearly erroneous" requirement of Rule 52(a) requires that the District Court's finding be affirmed.

## III

## EVEN IF THERE HAD BEEN NO RESCISSION OF THE INFORMAL MARCH CONTRACT BY THE NEW FORMAL SEPTEMBER CONTRACT, THERE WAS

ADEQUATE CONSIDERATION FOR THE SEPTEMBER CONTRACT DUE TO THE MORAL OBLIGATION ARISING FROM, AND THE BURDENSOME CONDITION AND UNFORESEEN DIFFICULTY CAUSED BY APPELLANTS' MISTAKE AS TO THE MATERIALS ACTUALLY REQUIRED BY THE SPECIFICATIONS.

(a) The Hawaii Cases Indicate That The Hawaii Supreme Court Will Seize Any Possible Opportunity to Avoid the Effect of the General Rule That Agreement To Pay Additional Compensation for a Previously Contracted for Performance is a Mere Gratuity.

In Ahlo v. Tai Lung, 9 Haw. 272 (1893) the court considered whether the payment of a portion of a debt could ever discharge such debt. The court at page 278 asked:

> "Was it proper to leave to the jury the question whether the remainder of the debt was released by Hackfeld & Co.? We find it laid down in well accepted authority that, in general, the acceptance of a less sum of money than is actually due is not a satisfaction of the debt and will not extinguish it, though it was agreed by the creditor to operate as such, as there is no consideration for the relinquishment. This rule is considered so harsh and so violative of good faith that courts are disposed to take out of the rule all those cases where there was any new consideration or where there was any collateral benefit received by the creditor. 'Courts have departed from it on slight distinctions.' Kellogg vs. Richards, 14 Wend. 116; Brooks vs. White, 2 Met 285.
>
> "'The rule and the reason were purely technical and often fostered in bad faith.'
>
> "'The history of judicial decisions upon the subject has shown a constant effort to escape from its absurdity and injustice.' Harper vs. Graham, 20 Ohio 106.

"The jury had before them the fact of the taking of all the defendant's goods from his store to be sold for the benefit of his creditors. This insured the creditors that the debtor's property would promptly be applied to their debts and they received 22 1/2 per cent. From these facts the jury might well find that this collateral benefit was a sufficient consideration and so an agreement to accept in full could be supported. This was a much more substantial consideration than some that were held good by the ancient authorities, as in Pinnel's case, 5 Coke 117, where the gift of a horse or the like is stated to be good consideration though of far less value than the debt released, and as stated in Sibner vs. Tripp, 15 M. & W. 37, that if a piece of paper or a stick of sealing wax is substituted the bargain may be carried out..." (Emphasis added).

Thus the Hawaii court has stated that it considers the general rule so harsh and violative of good faith that even slight consideration will take the case out from under the general rule. Further, the court held it proper to leave to the jury the question whether the "collateral benefit" of prompt payment of part was sufficient consideration for the release of the whole debt.

In this case, the District Court has found that the benefit to Richards of Air Conditioning's agreement to perform the contract at a $62,000 figure was sufficient consideration for Richards' agreement to pay that sum. Such a finding is consistent with the rule of Hawaii enunciated in the Ahlo case.

Appellants cite Magoon v. Marks, 11 Haw. 764 (1899) as indicating that Hawaii follows the general rule, and

urges that such rule should be applied here. However, while in that case the Hawaii court considered whether there was consideration for a promise to pay extra for the doing of what the promisee was already under an obligation to do, the court's statement of the general rule that such a promise was a mere gratuity, was obiter dictum. The court actually held that whether the promise of extra compensation was given for adequate consideration or whether it was a mere gratuity, was a question of fact to be determined by the jury, stating that the jury must consider the evidence as to just what the promise was for and whether there was consideration for it.

The result of the Magoon case is that the court found there were two simultaneous independent promises of compensation and therefore both were enforceable. Thus the statement of the court of the harsh general rule, obiter, must not be given overemphasis.

The holding of the Supreme Court of Hawaii in the Magoon case is consistent with its clear opinion of the general rule found in Ahlo v. Tai Lung, 9 Haw. 272 (1893). Such opinion is that the general rule is "harsh" and "violative of good faith" and that courts would take out from under the rule all cases where there was "any collateral benefit received by the creditor", and that courts would depart from that rule

"on slight distinctions."

Such a distinction is found in Trousseau v. Cartwright, supra, where the Supreme Court of Hawaii held that even though a creditor could force his debtor to pay "when able" by legal process, it was adequate consideration for a contract for the debtor to promise to pay "when able".

Thus, in this case, even though Richards could have forced Air Conditioning to pay damages for failure to perform the informal contract, it was a legal detriment to Air Conditioning to agree to go ahead with the contract.

(b) There is a Well-Recognized Exception to the General Rule Called the "Unforeseen Difficulties" or "Burdensome Conditions" Exception which is Applicable to the Facts Presented in this Case.

Assuming but not conceding that the decision of the lower court is not based upon a mutua rescission of the first informal contract, the decision should nevertheless be affirmed by this court for it has long been the rule that:

> "In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason [Citing many cases]" Helvering v. Gowran, 302 U.S. 238, 245 (1937).

Among those courts which follow the harsh general rule urged by the Appellants, there is substantial authority

supporting an exception to that rule, known as the "burdensome conditions" or "unforeseen difficulties" exception. A leading case following this exception is Linz v. Schuck, 106 Md. 220, 67 Atl. 286 (1907). In that case the parties entered into a contract for the building of a cellar underneath a house which rested on shallow foundations. It was discovered, upon the commencement of excavation, that under a top crust, in which the original foundations were located, the ground was soft gumbo mud, making the cost of excavation much higher than it would have been had the character of soil been uniform all the way down. The contractor refused to go ahead with his contract without additional compensation. An Agreement for additional compensation was entered into and the work completed, whereupon the land owner refused to pay more than the original contract price. The court at page 288 held that:

> "...When two parties make a contract, based on supposed facts which they afterwards ascertain to be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice but all right thinking people must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compensation .... Persons competent to contract can as validly agree to rescind a contract already made as they could agree to make it originally.... A contract founded upon an equitable duty, such as would be

> enforced by a court of equity, or upon a moral obligation, which no court of law or equity can enforce, or to do that which an honest man ought to do, or upon the waiver of a legal right by the party entitled to, it is maintained by a sufficient consideration...."

In Lange v. United States, 120 F.2d 886 (4th Cir. 1941), a case virtually on all fours with that before us, the court held that the exception to the general rule applied. In that case Lange Bros. were bidders for a contract to construct, among other things, a laundry chute for the Naval Academy. The specifications sent to Lange Bros. with reference to that chute read:

> "'8-08. Clothes Chute shall be made of corrosion-resisting steel sheets not less than 0.110 inch thick and conforming to grade 1, class 4 of specification No. 47S20a'". (Id. 887)

Lange, the contractor, had never heard of symbol No. 47S20a, and, in computing his original estimate, concluded that the metal required was a copper-bearing metal which cost only 5 cents a pound. However, it turned out that symbol No. 47S20a clearly called for the use of stainless steel which cost about 46 cents a pound. It was not until some seven months later, three months after a formal contract between Lange and the United States had been signed, that Lange learned the true significance of the symbol. On such discovery notification was given to the Government that Lange Bros. could not perform at the price they had given. After some

negotiation it was agreed that Lange would perform at a substantially higher figure which would cover its costs though not provide it a profit. The Fourth Circuit Court of Appeals stated first that if the United States had noticed the extremely cheap price bid by the contractor and realized that some mistake must have been made it would not have been able to create a binding contract by moving quickly to "snap up an offer that is on its face manifestly too good to be true." (To the same effect see Geremia v. Boyarsky, 107 Conn. 387, 140 Atl. 749 (1928)).

The court in the Lange case pointed out at page 889 that:

> "We are of the opinion that with the exception of the provision for a higher price, the second contract was practically identical with the first."

The court then held that though under Maryland law adherence is given to the general rule (that there is no consideration to support a promise to pay additional compensation for a previously agreed upon performance), the spirit of the Maryland cases recognized an exception:

> "...an exception criticized by Williston on Contracts § 130(a), but seemingly recognized in the Restatement in § 76, Illustration 8. The exception relates to unforeseen difficulties in the performance of the contract, and is thus expressed in Linz v. Schuck, supra, 106 Md. at page 229, 67 A. at page 288, 'But, where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were

not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration.'" (at p. 890)

The court pointed out that the mistake by the contractor as to the meaning of the symbol following the specification calling for corrosion-resisting steel sheets was an "unforeseen difficulty" and fell under the exception to the general rule.

In our case, at the time the March contract bid was submitted, Air Conditioning believed that galvanized iron was the metal required, whereas, if it had not been mistaken in its examination of the specifications, it would have realized that the material called for was sheet zinc alloy. Upon discovering its mistake Air Conditioning notified Richards, informing Richards that it would not proceed on the basis of its bid without additional compensation. After considerable negotiation, the contract of September 29, 1958, was entered into to allow additional compensation to Air Conditioning for the mistake made by it in its basic assumptions as to the materials called for by the specifications at the time of entering its original bid. Thus this case falls squarely under the unforeseen difficulties exception as enunciated by the Fourth Circuit Court of Appeals in the Lange

case (and see Evergreen Amusement Corporation v. Milstead, 206 Md. 610, 112 A.2d 901 (1955), where the Maryland court approves the decision of Judge Dobie in the Lange case.)

In Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., 251 F.2d 77 (10th Cir., 1958) the Tenth Circuit Court considered, under Oklahoma law, an oral contract to pay additional compensation for services required to be performed under the terms of a prior written contract. At the time of entering into the contract it was believed by the contractor that roughly 600,000 tons of overburden would have to be moved whereas after some seven months it became apparent that at least double that amount would have to be moved. The defendant promised to pay additional consideration if the contractor would proceed with the contract.

The trial court specifically found that the Testing Company performed no services pursuant to the oral contract which it was not already bound to do by the terms of the written contract. The court stated that:

> "It is the general rule, followed in Oklahoma where this contract was made and performed, that a promise to pay additional compensation for the doing of that which the promisee is already legally bound to do or perform, is insufficient consideration for a valid and enforceable contract. [Citations omitted]. Of course there are exceptions to the rule, the oldest of which is the one recognized only in Massachusetts to the effect that a new promise given to the promisee who has elected not to perform a subsisting contract on penalty of damages constitutes

sufficient consideration. [Citations omitted]. But, this doctrine has been repudiated as an exaction akin to extortion. [Citations omitted].

"Another more widely accepted exception might properly be called the 'unforeseeable difficulties exception', under which the courts have recognized the equities of a promise for additional compensation based upon extraordinary and unforeseeable difficulties in the performance of the subsisting contract. In these circumstances, the courts generally sustain the consideration for the new promise, based upon standards of honesty and fair dealing and affording adequate protection against unjust or coercive exactions. See Blakeslee v. Board of Water Commissioners of City of Hartford, 106 Conn. 642, 139 A. 106, 55 A.L.R. 1319; Grand Trunk Western R. Co. v. H. W. Nelson Co., 6 Cir. 116 F.2d 823, 834; Lange v. United States, 4 Cir. 120 F.2d 886; Evergreen Amusement Corp. v. Millstead 206 Md. 610, 112 A. 2d. 901; Restatement Contracts § 76, Comment 8; See cases and comment 12 A.L.R. 2d § 6, p. 107.

"As far as we can determine, Oklahoma courts have not had occasion to embrace or reject what seems to us a salutary exception to the rule. But, there can be no doubt that the oral contract was made in the face of unforeseen and substantial difficulties - circumstances which were not within the contemplation of the parties when the original contract was made, and which were recognized when the subsequent oral contract was entered into. The performance of the contract took more than twice as long as the parties estimated...." [Citations omitted] (Emphasis added) (Id. 78-9)

The Tenth Circuit Court in the Pittsburgh Testing Lab. case was confronted with a situation where the Oklahoma court had not ruled on the existence of the "unforeseen difficulties" exception, though it had indicated that it followed the general rule. The Court had no hesitation in applying the exception as a part of Oklahoma law, calling it

a "salutary exception to the rule."

Many cases in other jurisdictions also support the unforeseen difficulties exception. See § 6 at page 107 of 12 A.L.R. 2d 78, Anno: "Consideration for Additional Pay".

In Grand Trunk Western Ry. v. H. W. Nelson Co., 116 F.2d 823, (6th Cir. 1941) the court at page 834 stated that:

> "The general rule is that a promise to pay a construction contractor additional compensation for performance of a contract which he is under obligation to perform is invalid because without consideration, but the exception is equally well recognized that where, during the prosecution of the work, some unforeseen and substantial difficulties in its performance occur which were not known or anticipated by the parties when the contract was entered into and which casts upon the contractor additional burdens not contemplated and the contractee promises the contractor extra pay or benefits if he will complete the contract, such an agreement is valid and enforceable. United States v. Cook, 257 U.S. 525, 526, 42 S. Ct. 200, 66 L. Ed. 350; Scanlon v. Northwood, 147 Mich. 139, 110 N.W. 493."

See also to the same effect: Blakeslee v. Board of Water Com'rs. 106 Conn. 642, 139 Atl. 106 (1927) and United Steel Co. v. Casey, 262 Fed. 889 (6th Cir. 1920) where the court stated at page 893 that:

> "However, where a contract must be performed under burdensome conditions not anticipated, and not within the contemplation of the parties at the time the contract was made, and the promisee measures up to the right standard of honesty and fair dealing, and agrees, in view of the changed

> conditions, to pay what is then reasonable, just, and fair, such new contract is not without consideration within the meaning of that term, either in law or in equity." [Citations omitted].

In the United Steel Co. case the court pointed out, in distinguishing the case of Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844 (1891) that in the Lingenfelder case there was no reasonable excuse for the contractor's refusal to perform the work covered by the contract according to its terms. As the Missouri court had pointed out, the contractor "took advantage of Wainwright's necessities and extorted the promise" without "even the flimsy pretext that Wainwright had violated any of the conditions of the contract." (Id. 848)

The rationale applied by the Sixth Circuit in distinguishing the Lingenfelder case indicates when the general rule should be applied. The general rule should be applied, as it was in the Lingenfelder case, and also as it was in Alaska Packers' Association v. Domenico, 117 Fed. 99 (9th Cir. 1902) where there is no equitable or moral justification whatever for the demand for additional compensation. The doctrine of the Alaska Packers and Lingenfelder cases stands as protection against one party to a contract extorting a promise of additional compensation by taking advantage of the necessitous situation of the other party. Where, however, there is a clear mistake on the part of one

party to the contract as to a basic premise upon which it based its bid, which mistake would cause it substantial loss if an agreement for additional compensation were not entered into it is clear that the mistaken party has a moral claim to additional compensation, and that therefore a contractual agreement to such effect is not an agreement to meet a purely extortionary demand.

An agreement to pay additional compensation, where, as a matter of equity or morality there are grounds for such additional compensation, falls under the "burdensome conditions" or "unforeseen difficulties" exception to the general rule. This exception has been clearly recognized by the Fourth, Sixth and Tenth Circuits, by many other courts, and will, in all likelihood be recognized by the Supreme Court of the State of Hawaii at such time as the Court has an opportunity to so rule.

The rationale underlying the exception to the general rule was challenged in the Supreme Court of the United States, where, in United States v. Cook, 257 U.S. 523 (1922) an enactment agreeing to pay a contractor additional compensation for a completed job was alleged to be beyond the power of Congress, on the grounds that there was no consideration for such an enactment. The court stated that, in the light of certain unforeseen conditions which caused the

contractor considerable additional expense "it seems to us [that the] alteration of the contract [was] in response to equitable considerations... there was the moral consideration which properly induced the recognition of an honorable obligation, and turned an unenforceable equity into a binding and effective provision." (Emphasis added) (Id. 526-7). The Court held that the moral consideration was sufficient to support the enactment to pay additional consideration.

Air Conditioning, as a result of making a mistake in reading the job specifications, made a bid based on such mistake (the mistake being the erroneous substitution of galvanized iron for zinc), and has a moral claim for additional compensation. An agreement recognizing such claim and promising additional compensation if Air Conditioning would perform was entered into by the parties. Such agreement, the contract of September 29, 1958, is therefore valid and enforceable under the aforementioned exception to the general rule.

It is interesting to note that the harshness of the strict general rule has been modified or abrogated in whole or part by statute in thirteen states. See California Civil Code, § 1524; Montana Rev. Code of 1947, 58-504; N. Dakota Code of 1943, 9-1307; S. Dakota Code of 1939, 47.0236; Michigan Compiled Laws of 1948, § 566.1; New York

Personal Property Law, 33(2); Alabama Code of 1940, Title 7, 381; Oregon Comp. Laws of 1939, 2-806; Tennessee Code of 1934, 9742; Virginia Code of 1950, § 11-12; Georgia Code Ann. 1936, 20-1204; Maine Rev. St. of 1944, Chapter 100, 65.; N. Carolina Gen. Stat. 1953, Michie ed., 1-540. Certainly, where so many states have been forced to make legislative exceptions to the harsh general rule, such general rule should not be rigorously applied where there are sufficient grounds to avoid its effect by giving recognition to the "burdensome conditions" exception thereto and where the Hawaii Court has indicated its dislike of the harsh general rule.

The cases cited by Appellants do not require a contrary rule and do not support the contention made by Appellants that there is no consideration for Richards' agreement to pay additional compensation to Air Conditioning for its performance. Appellants rely primarily on the Alaska Packers case, supra, and on Williston on Contracts, § 532, which in turn relies heavily on the Lingenfelder case, supra. As pointed out earlier, both of those cases are cases where there was no justifiable reason for the contractor's refusal to perform in accordance with the terms of the original contract. Rather, such cases were cases where one party was simply taking advantage of the exigencies of the situation of the other party to the contract to extort

additional payment, without any equitable or moral justification therefor. The other cases cited by Appellants do not involve situations where there was a mistake or a later discovery of changed circumstances with reference to the basic premises underlying the creation of the contract. In other words, the cases cited by Appellants stand for the general rule but in no way negate the existence of the "unforeseen difficulties" exception to that rule, which exception, due to the clear mistake made by Appellee is applicable in this case.

The ruling of the Alaska Packers case under the facts of that case is just and proper. Never should a contractor be able to extort additional sums of money from the party for which he is performing a contract by virtue of the sole fact that he is in a position and has the inclination to extort such sums. In like manner it is just as immoral and improper for a person such as Mr. Richards in this case to entice another party into performing a contract which the other party has refused to perform by the tricky and deceitful device of promising the other that if he will perform that he will be awarded additional compensation, when in fact the deceitful party has no intention of paying the agreed additional compensation. As a practical matter, should this court make such a holding and adopt such a policy the entire

area of contract law dealing with mutual rescission and the formation of new contracts would be left in a state of doubt and chaos. Accordingly, rather than encouraging people to settle ligitimate disputes by mutually rescinding an old and forming a new contract, the law would encourage litigation and economic waste. The law pertaining to mutual rescission is now certain. Certainty is desirable and necessary in the law of contracts. To cloud the area with confusion so as to protect he who would deceive another in order to obtain performance would be unwise.

(c) The Hawaii Court Would Apply the "Burdensome Conditions" Exception to This Case and Hold That the Agreement of September 1958 Was Supported by Adequate Consideration.

It is clear that, as pointed out in the Hawaii cases cited supra, the Hawaii Court has and will continue to depart from the so-called general rule whenever in equity or morality there is any basis for departing therefrom, and the parties have agreed to a new contract which implements what, in the absence of such new contract, would have remained merely an unenforceable moral obligation.

In Lange v. United States, supra, a case virtually on all fours with this case, the Fourth Circuit had no hesitation in holding that Maryland law would recognize such

an exception. In Pittsburgh Testing Lab. v. Farnsworth & Chambers Co., supra, with even less state law to guide it, the Tenth Circuit found that the Oklahoma court would follow the exception to the general rule.

This court must now decide this case as a matter of Hawaii law. The Hawaii Supreme Court has indicated that it will, whenever possible, avoid the harsh, strict application of the general rule. The Hawaii cases justify the recognition by this court of the unforeseen difficulties exception as a matter of Hawaii law, and the facts of the case demand its application.

## CONCLUSION

For the reasons stated above the judgment of the District Court should be affirmed.

Respectfully Submitted,

James S. Campbell

Robert B. Bunn

Of Counsel:
SMITH, WILD, BEEBE & CADES

4th Floor, Bishop Trust Building
Honolulu, Hawaii